APPENDIX A

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV 97-683

KEVIN SPARKS

Plaintiff,

vs.

CASH AMERICA OF ALABAMA, INC., *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

I. PROCEDURAL HISTORY

The Plaintiff, Kevin Sparks, filed this breach of contract and fraud action against the Defendants, Cash America of Alabama, Inc., Cash America International, Inc., and Bill Ewing, on March 3, 1997. A trial by jury was held in this case beginning on June 2, 1998. The jury returned a verdict on June 5, 1998, in favor of the Plaintiff and against the Corporate Defendants in the amount of $1,150,000. The jury found in favor of the individual Defendant, Bill Ewing. The verdict included an award of compensatory damages in the amount of $150,000 and punitive damages in the amount of $1,000.000. This matter came before the Court on the Defendants' Motion for Judgment as a Matter of Law, or in the alternative, for a Remittitur or New Trial. The post-judgment motion was heard by this Court on July 10, 1998. After due consideration of the content of the motion, the Plaintiffs response, the arguments of counsel, and controlling precedential authority, this Court is of the opinion that Defendants' Motion for Judgment as a Matter of Law is due to be and is hereby DENIED, Defendants' Motion for a New

Trial is due to be and is hereby DENIED, but the Motion for Remittitur of Damages is due to be granted for the reasons hereinafter set forth..

II. STATEMENT OF FACTS

The Plaintiff, Kevin Sparks, contended that employees of Cash America fraudulently misrepresented and/or concealed the fact that he would not receive an incentive bonus to which he was entitled under the incentive bonus plan in effect at the time of his employment. Plaintiff also claimed that the Defendants committed a breach of contract by refusing to comply with the provisions of the 1994 incentive bonus plan.

The Plaintiff claimed that he relied upon certain representations made by employees of Cash America, including his supervisor, Bill Ewing, to the effect that he would receive an incentive bonus payment pursuant to the terms of the 1994 bonus plan if he agreed to accept a position as a region manager. The amount of the bonus for the first nine months of 1995 as calculated under the performance factors of the 1994 bonus plan was in excess of $32,000. However, the Plaintiff subsequently received a bonus in the amount of $7,500. The Plaintiff claimed an out-of-pocket loss of $25,000 and unspecified damages for mental anguish. The Defendants claimed that the 1994 bonus plan contained objective and discretionary factors and the $7,500 bonus award was based in part on the "discretionary" factors. The Defendants also claimed that the Plaintiff was never promoted to the position of "region manager" over all of Division Five, but served as an assistant to the vice president of the Division, with supervisory authority over only half of the stores in that Division. Therefore, in addition to the Defendants' claim that payment of the bonus was discretionary, they farther asserted the Plaintiff was entitled to a bonus only on the stores that he directly supervised in Division Five.

III. CONCLUSIONS OF LAW

This Court finds no merit in the Defendants' arguments that the Plaintiff failed to present clear and convincing evidence to support an award of punitive damages or substantial evidence in support of the claims for fraud or breach of contract. This Court finds that the testimonial and documentary evidence presented at trial was sufficient to support the Plaintiffs claims for fraud and breach of contract and that there was evidence from which a jury could reasonably infer that the Defendants' conduct was gross, oppressive, or malicious justifying an award of punitive damages. This Court, however, finds that the award of compensatory and punitive damage awards were grossly excessive.

A. The award of compensatory damages in this case is excessive

The jury awarded the Plaintiff $150,000 in compensatory damages in this case. The Plaintiff claimed his out-of-pocket loss was approximately $25,000. Therefore, the jury's verdict included an award of $125,000 for "mental anguish." The Alabama Supreme court has recently addressed the issue of the excessiveness of compensatory damages in *K-Mart Corp. v. Kyles*, 1998 WL 258183 (Ala. May 22, 1998). In that case, the plaintiff claimed she was maliciously prosecuted after K-Mart accused her of shoplifting. The jury returned a verdict in her favor awarding compensatory damages in the amount of $100,000 and punitive damages in the amount of $100,000. The evidence at trial demonstrated that the plaintiff spent approximately three hours in jail after having been processed and fingerprinted and paid $4000 in out-of-pocket expenses to hire an attorney and to obtain bail before her criminal case was ultimately "no billed."

The Supreme Court reversed entry of the judgment in favor of the plaintiff, reasoning that the plaintiffs alleged mental

anguish was not severe enough based on the evidence to warrant a $100,000 compensatory damage award. The Court held:

> We give stricter scrutiny to an award of mental anguish where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced
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> * * * *
>
> Thus, in light of the paucity of the evidence presented by the plaintiff in this case, we conclude that the jury abused its discretion in awarding her $100,000 in compensatory damages . . . . We believe that the greatest amount of compensatory damages a jury, using sound discretion, could have awarded was $15,000. Accordingly, we conclude that the trial court erred in denying the defendant's motion for a remittitur of damages or a new trial.

The Court also noted that mental anguish is not an item for which a "precise amount of damages can be assessed" *K-Mart, Id.*, at *8. In considering whether a jury verdict for compensatory damages is excessive, the evidence must be viewed from the plaintiffs perspective and a determination made as to what the evidence supports in terms of the plaintiff's suffering. *K-Mart, Id.*, at *8.

The nexus between the allegations and proof of mental anguish is tenuous. With regard to the Plaintiffs testimony, he could only say that the Defendants' conduct made him feel "as if his arms and legs had been cut off and all he could do was lie on the couch." The Plaintiff then attempts to give his subjective symptoms a ring of truth by connecting them to the expert testimony of Dr. Sullivan, who treated the Plaintiff from December 8, 1995, to April 12, 1996. Dr. Sullivan treated the Plaintiff, shortly after he received the bonus check, for stress-related anxiety, a sleep disorder, and high blood

pressure. Dr. Sullivan saw the Plaintiff several times over a matter of months and attributed the symptom to work-related factors based on a medical history given by the Plaintiff. However, when asked what the genesis of the problems were, Sullivan replied that he could not say with "a hundred percent certainty that work related stress was the cause of the Plaintiffs symptoms. On cross examination, Sullivan admitted that Sparks *never* mentioned a problem with incentive bonus payments in the history he gave the doctor. He also admitted that the Plaintiffs cigarette smoking and coffee drinking could have caused or contributed to his symptoms. Much of Dr. Sullivan's testimony results in opinions premised on speculation, not a reasonable degree of medical certainty. The law forbids awarding damages of a speculative or conjectural nature.

This Court concurs that the jury reasonably inferred that the Plaintiff suffered some measure of mental anguish from the realization that he was receiving a much lower bonus payment than that promised and expected. However, even when viewed in a light most favorable to the Plaintiff the paucity of the evidence presented does not support an award of $125,000, for mental anguish. This Court believes that the greatest amount of compensatory damages a jury, using sound discretion, should have awarded the Plaintiff is $75,000 and, accordingly, reduces the jury's compensatory damage award to $75,000.

B. The award of punitive damages in this case is excessive.

In *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1995), the Supreme Court addressed the constitutional challenge to punitive damage awards and announced a decision requiring states to judicially review jury verdicts that award punitive damages to determine whether such verdicts violate the tortfeasor's rights under the Due Process Clause of the United States Constitution. The Supreme Court emphasized that this post-verdict judicial review must be

meaningful, with special emphasis being given to three "guideposts": (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to the amount of actual or potential harm suffered by the plaintiff; and (3) a comparison of the amount of the jury's verdict with civil or criminal penalties (if any) that could be imposed under the law for comparable misconduct. *BMW*, *Id.*, at 1598-1603.

In Alabama, the Supreme Court has instituted certain "protections" in an effort to assess the constitutionality of a punitive damages award. These factors are commonly referred to as the "*Hammond/Green Oil* factors." *See Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). The commonly cited factors are: (1) the harm likely to occur and the harm that actually occurred; (2) the degree of reprehensibility of the defendant's conduct; (3) the financial gain to the defendant from the behavior; (4) the financial position of the defendant; (5) the cost of litigation; (6) any available criminal sanctions; and (7) similar civil actions.

While the United States Supreme Court has mandated an analysis pursuant to the factors cited above, it did not prohibit the consideration of other factors as well. The courts of this state continue to utilize the factors set down in *Hammond* and *Green Oil*, as well as the factors set out in Ala. Code §6-11-23(b)(1975). *See American Pioneer Life Insurance Co. v. Williamson*, 704 So. 2d 1361 (Ala. 1997); *Talent Tree Personnel Services v. Pleenor*, 703 So. 2d 917 (Ala. 1997). The Alabama Supreme Court has recently addressed the excessiveness of punitive damages under the analysis mandated by the Court in *BMW* in two cases involving employer/employee related disputes over the payment of sales commissions. *American Pioneer*, *Id.*; *Talent Tree*, *Id.* The facts of those cases are similar to those in this case.

In *Talent Tree*, a sales representative for an employment agency sued her employer and the employer's office manager for damages based on fraudulent misrepresentation and suppression. She alleged that the defendants had manipulated her quarterly sales figures in order to cheat her out of sales commissions. The jury found for the employee, awarding her $300,000 in compensatory damages and $3,000,000 in punitive damages. The trial court reduced the punitive damages award to $2,000,000 before appeal. The employee presented documents showing that her sales figures had been reduced without her knowledge, that upper-level management had crossed out some figures and arbitrarily replaced them with lower figures, that her commission calculations had been retroactively reduced by applying the higher quota requirements of an account executive, and that certain new accounts she had established either had not been credited to her commission calculation or had been removed from that calculation after the fact. The result was that the employer had underpaid her commissions for the time period in question. On appeal, the defendants argued that the award of $2,000,000 was unconstitutionally excessive in light of the *BMW* case. The Alabama Supreme Court agreed and ordered a reduction of the award to $1,500,000.

In applying the factors set down in *BMW*, *Hammond*, *Green Oil*, and Ala. Code § 6-11-23(b)(1975), the court found: (1) there was no evidence of prior misconduct; (2) the employer, had for the most part, complied with the employee's discovery requests, but failed to provide one document showing that her sales figures had been intentionally lowered; (3) the employee gave the defendants a reasonable opportunity to remedy the conduct; and (4) the employer concealed its conduct by failing to disclose the reduction in the employee's sales commissions.

Under the second prong of the *BMW* analysis, the court found that a 5 to 1 ratio of punitive damages to compensatory

damages was reasonable under the circumstances of the case. Under the third prong of the *BMW* analysis, the court noted that the criminal penalty that could be imposed in this case, theft by deception of more than $1,000, was a class B felony, punishable by 2 to 20 years imprisonment. Compared to this criminal sanction, the court found that the punitive damage award was not excessive.

The Court also considered the additional factors set out in *Green Oil*. The court noted that the mental anguish the employee suffered, the employer's reckless disregard for her economic rights, and the existing criminal sanctions established a reasonable relationship between the award and the harm that occurred and that was likely to occur. The court also found that the defendant stood to profit from the wrongful conduct, the award would have little impact upon the financial position of the employer, and no criminal sanctions or other civil actions were pending against the employer. Based on its analysis, the court lowered the punitive damages award from $2,000,000 to $1,500,000.

In *American Pioneer*, an employer/employee dispute over sales commissions, the court ordered the reduction of punitive damages from $2,000,000 to $750,000. The employee contracted with the employer to sell its insurance products in 1984, and did so until 1988, when he was terminated for a lack of production. He was rehired in May of 1988 and sold for the employer until he was again terminated in April of 1989 for a lack of production. He received a letter from the employer shortly after his termination informing him that it was invoking the "forfeiture of commissions" clause in his contract and that he would no longer be entitled to receive commissions on insurance policies already in place. The employer stated that it was invoking the provision because the plaintiff employee had replaced a client's policy with an insurance product from another insurance carrier. According to the evidence, the forfeiture clause was invoked without any

investigation on the part of the employer to determine if the employee had "induced" the client to replace the employer's policy. After his commissions were terminated, the employee sued the employer for breach of contract and fraud. He was awarded $250,000 in compensatory damages and $3,000,000 in punitive damages. The trial court reduced the punitive damages award to $2,000,000 prior to the appeal.

Under the reprehensibility prong of the *BMW* analysis, the court noted that the employee's damage was economic and did not endanger his health or safety, his commissions would have declined over time, even if the forfeiture provision had not been invoked, and, although the employee asserted that other agents received similar treatment, he failed to prove this at trial. The court noted that the degree of reprehensibility of the employer's conduct in this case would have been seen as much greater if the employee had proven that the employer had treated other agents similarly.

Under the second prong of the *BMW* analysis, the original punitive damages award was eight times the amount of the compensatory damages award. The court considered the reduction, establishing a 3 to 1 ratio ($750,000 to $250,000), reasonable in this case. Under the third prong of the *BMW* analysis, the court noted the lack of criminal or other civil actions being taken against the defendant. Finally, the court noted the employer's financial condition, finding that an award of $750,000 would eliminate any profit realized by the employer. Also, the $750,000 represented approximately 1% of the net worth of the employer at the time of the wrongful conduct and 11% of their cash surplus reserves and, therefore, the payment of the $750,000 would not impair their ability to conduct business with their insureds. The Alabama Supreme Court affirmed the award of compensatomy damages and ordered a remittitur of the punitive damages form $2,000,000 to $750,000.

This Court first observes that the facts of the instant cause are not nearly as egregious as those in either *Talent Tree* or *American Pioneer*. Moreover, the analysis mandated by the precedential authorities previously cited leads to the conclusion that the jury's award of $1,000,000 in punitive damages is excessive and reduces it to $225,000. The basis for this conclusion is set forth below.

1. Degree of reprehensibility of the defendant's conduct

In *BMW*, the United States Supreme Court noted that the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. *See BMW*, 116 S.Ct., at 1599. It is clear from the holding in *Talent Tree* and *American Pioneer*, that to sustain an award of punitive damages there must be a showing of malice or reprehensible conduct and these elements are absent in the present case. The Plaintiff directed his claims specifically to actions taken by Terry Kuntz, Bill Ewing, Dan Feehan, Kim McClendon, and Rob Brockman.

Terry Kuntz, who served as vice president of operations during the time period in question, was alleged to have defrauded and deceived the Plaintiff by promising to compensate him under the 1994 plan, which induced the Plaintiff to relocate to Mobile and accept a promotion to region manager in January of 1995. However, Mr. Kuntz was not named in the Plaintiffs lawsuit, nor was he called as a witness by the Plaintiff. The only evidence presented of Kuntz's alleged representations were conversations between the Plaintiff and Kuntz in which the Plaintiff alleges Kuntz made the statements. In the absence of Kuntz's testimony or substantial documentary evidence, this Court finds no basis to conclude that Kuntz's conduct was reprehensible.

Bill Ewing served as supervisor to the Plaintiff during the time period in question. The Plaintiff contends that Ewing misrepresented the Plaintiffs status as a region manager and

fraudulently represented to the Plaintiff that he would receive a bonus based on all of Division Five. The jury, however, found in favor of Bill Ewing on the claims asserted against him in his individual capacity. Also, it was Ewing who recommended an increase in the bonus paid to the Plaintiff from $6,000 to $7,500. Even if the claims made by the Plaintiff against Ewing are true, the Court is not persuaded that said comments were made with an oppressive or malicious intent, because it was Ewing who persuaded management to enhance Plaintiff's bonus.

Dan Feehan was president of the Defendant corporation during the time period in question. Feehan admitted that the corporation erred in failing to communicate to employees the fact that the 1994 bonus plan would not be used in 1995. The decision to terminate the 1994 plan, which was made at some point in the early part of 1995, was admittedly not communicated to all employees. The jury reasonably inferred that the actions of the corporation in failing to communicate the termination of the 1994 bonus plan to the Plaintiff were oppressive and malicious under the circumstances. However, this Court notes, and Plaintiff admits, that Feehan attempted to schedule several meetings with the Plaintiff in November and December of 1995 and January of 1996 to discuss the problems that had arisen regarding the bonus payment. The Plaintiff admittedly refused to meet with Feehan.

Rob Brockman and Kim McClendon worked at Cash America headquarters. The Plaintiff claimed that they sent him information which led him to believe that he was going to get a larger bonus than he received. However, both testified, and the Plaintiff admitted, that they provided him with all of the statistical and financial information that he requested. The Plaintiffs accessibility on demand to the financial data he requested persuades this Court that the representations of Brockman and McClendon lacked oppressive or malicious intent.

The testimony provided very little evidence of conduct on the part of the Defendants that the jury could have determined was gross, oppressive, or malicious. The acts complained of in this case were clearly not as egregious and malicious as the acts complained of in the *American Pioneer* and *Talent Tree* cases. The Defendants, as well as co-employees of the Plaintiff, testified that the 1994 plan contained discretionary factors in addition to objective criteria. Also, the harm suffered in this case was purely economic and amounted to a loss of approximately $24,500. The Alabama Supreme Court has recognized that torts causing only economic injury are less worthy of large punitive damages awards than torts inflicting injuries to health or safety. *See American Pioneer Life Insurance Co. v. Williamson*, 704 So. 2d 1361 (Ala. 1997). The Court also notes that the bonus received by the Plaintiff was twice as much as the next highest award received by a region manager. In addition, this Court has closely reviewed the documentary evidence submitted in this case, but found no further justification for the large punitive damages award. Taking these facts into consideration, this Court cannot reconcile the large punitive damages award with the evidence adduced at trial and the law of this jurisdiction.

In assessing the reprehensibility of the defendant's conduct, the courts have also considered the following factors.

a. Duration of the conduct

The Plaintiff contends that the conduct in this case lasted for approximately one year. Plaintiff contends that the Defendants knew that the 1994 plan would not be carried over to 1995 as early as December of 1994 or January of 1995 and, therefore, were aware that the Plaintiff would not receive the bonus for almost a year before he was actually notified. In *Talent Tree*, the conduct occurred over a three month period, so the duration of the alleged wrongful conduct in this case is of sufficient duration to sustain the imposition

of an award of punitive damages, though not the amount awarded by the jury.

b. Degree of defendants' awareness of any hazard which his conduct has caused or is likely to cause

Defendants contend that they did not intentionally act to deprive the Plaintiff of the bonus payment to which he alleged he was entitled. However, they stated that the employees should have been informed about the status of the incentive bonus plan, but admittedly failed to provide such notification for one reason or another. In *Talent Tree* and *American Pioneer*, there was concrete evidence of the defendants' malicious and egregious conduct and their knowledge of the hazard their conduct had caused. In this case, the Defendants' knowledge of the hazard their conduct was likely to cause is based mainly on the testimony of the Plaintiff. However, the evidence presented at trial, could have supported a reasonable inference by the jury that the Defendants were aware of the hazard that their conduct was likely to cause and could have provided support for the award of punitive damages in this case.

c. Any concealment or "cover up" of the hazard

Plaintiff contends that the Defendants attempted to "cover up" the fact that the Plaintiff would not receive the bonus payment to which he alleges he was entitled. The Plaintiff has cited a page from Bill Ewing's day planner which he contends was evidence of Ewing's knowledge that the Plaintiff's bonus would be less than had been represented to him. Also, the Plaintiff has cited the fact that Plaintiff was paid a bonus in October of 1995 based on calculations of the entire region. The Court concludes that the pages from the day planner were inconclusive. The defense witnesses testified that the October bonus payment was simply a miscalculation. While the October payment could certainly

allow the jury to make an inference that the Defendants recognized the Plaintiff as supervising all of his region and that their actions in conjunction therewith were malicious or oppressive, the Court notes that the Defendants provided the Plaintiff with all the financial and statistical information related to the bonus payment which he requested. Further, the Defendants attempted to meet with the Plaintiff on several occasions to discuss the problems that had arisen regarding the bonus payment. The Plaintiff admittedly refused to meet with representatives of Cash America. While there was evidence presented from which the jury could have inferred a "cover up," this Court finds more credible the evidence that representatives of the Defendants repeatedly sought to meet with the Plaintiff to identify and resolve their differences, but the Plaintiff repeatedly refused.

d. Existence and frequency of similar past conduct

The parties conceded that there was no similar past conduct involving the payment of incentive bonus payments. The Alabama Supreme Court has stated that the degree of reprehensibility of a defendant's conduct would "be seen as much greater" if the defendant could prove a pattern and practice of similar conduct. *American Pioneer Life Ins. Co. v. Williamson, Id.*, at 1365-66. In this case, the Plaintiff failed to introduce evidence of prior misconduct and failed to present substantial evidence to support his claim that other employees suffered damages as a result of the Defendants' conduct. Thus, the Plaintiff failed to prove a pattern and practice of wrongful conduct.

e. Quality and quantity of rights of others that were disregarded by the defendant

The Plaintiff alleges that over eighty employees suffered economic damages as a result of the Defendants' conduct. However, as stated above, the Plaintiff failed to present substantial evidence in support of this claim. Also, the parties

acknowledged that no other lawsuits have been filed or complaints lodged against the Defendants for the failure to pay incentive bonuses. The Court finds this to be a mitigating factor in support of Defendants' argument that the award of punitive damages was excessive in this case.

f. Nature and extent of efforts on the part of the defendant to remedy the wrong

As previously stated, the Defendants attempted to meet with the Plaintiff on several occasions to discuss the problems that had arisen regarding the bonus payment. The Plaintiff admittedly refused to meet with Mr. Feehan at Cash America's expense. Moreover, the Defendants sent Mr. Brockman to Mobile in November of 1995 to meet with the Plaintiff. It is uncontested that the subject of the incentive bonus payment was never mentioned at this meeting. The Defendants clearly made some effort to address the problems that had arisen regarding the bonus payment. This factor would also serve as a mitigating factor in support of the Defendants' argument that the award of punitive damages was excessive in this case.

g. Opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong

As discussed above, the Plaintiff gave the Defendants little or no opportunity to remedy the wrong. This factor weighs against the Plaintiff in this Court's analysis of the reprehensibility of the Defendants' conduct.

2. Ratio between the amount of compensatory damages and punitive damages awarded

The ratio of punitive damages to compensatory damages now stands at 6.6 to 1. This Court has reviewed current case law and notes that the ratio of punitive damages to compensatory damages generally falls below 12 to 1. In

American Pioneer and *Talent Tree*, the court approved ratios of 3 to 1 and 5 to 1, respectively. While recognizing that there is no set mathematical formula for determining an award of punitive damages, the Alabama Supreme Court has suggested a ratio of 3 to I as a "benchmark" from which to determine reasonableness and fair punishment. *See Union Security Life Ins. Co. v. Crocker*, 709 So. 2d 11 18 (Ala. 1997); *Life Ins. Co. of Georgia v. Johnson*, 701 So. 2d 524 (Ala. 1997); *Bryant v. Bryant Welding & Indus. Maintenance, Inc.*, 710 So. 2d 900 (Ala. Feb. 27, 1998). Careful consideration of the facts of the instant case coupled with the ratios found appropriate in the *American Pioneer* and *Talent Tree* cases, this Court determines that a 3 to 1 ratio is appropriate in this case.

3. Difference between the punitive damages award and the civil or criminal sanctions that could be imposed for comparable misconduct

The parties have agreed that there are no criminal or civil sanctions that could have been imposed against the Defendants in this case for their alleged conduct.

4. Profitability of the defendant's conduct

The Plaintiff contends that he suffered approximately $25,000 in damages and that the other eighty employees affected by the termination of the 1994 plan suffered damages in the amount of $88,000. Assuming for the sake of argument that the Plaintiffs calculations are accurate, the Defendants recognized a profit of approximately $113,000. Therefore, any punitive damages award in excess of this amount would remove any profit the Defendants received as a result of their conduct.

5. Defendants' financial condition

The Defendants are large corporations with revenues and profits reaching millions of dollars each year. An award of

$1,000,000 in this case would have little impact upon the Defendants' financial positions.

After due consideration of the factors and precedential authorities herein cited, this Court concludes that the jury's award of $150,000.00 in compensatory damages and $1,000,000.00 in punitive damages is not supported by the facts or the law.

Accordingly, it is ORDERED that the amount of compensatory damages be and hereby is reduced to $75,000.00 and the amount of punitive damages be and is hereby reduced to $225,000.00 for a total award to the Plaintiff of $300,000.00

Done and ORDERED on this the 7th day of August, 1998

/s/ Chris N. Galanos
CHRIS N. GALANOS
Circuit Judge

APPENDIX B

SUPREME COURT OF ALABAMA

1972125

KEVIN SPARKS

v.

CASH AMERICA INTERNATIONAL, INC., *et al*,

1972229

CASH AMERICA INTERNATIONAL, INC., *et al*.

v.

KEVIN SPARKS

Appeals from Mobile Circuit Court

(CV-97-683)

ON APPLICATION FOR REHEARING

PER CURIAM.

The opinion of October 27, 2000, is withdrawn, and the following opinion is substituted therefor.

Kevin Sparks filed this breach-of-contract and fraud action against his former employer, Cash America of Alabama, Inc.; the employer's parent corporation, Cash America International, Inc.; and his supervisor, Bill Ewing, on March 3, 1997. We affirm conditionally.

Cash America International owns and operates pawnshops worldwide. Cash America of Alabama, an Alabama

corporation, operates the pawnshops in Alabama, with a place of business in Mobile County. Sparks, a management employee, had worked at a number of Cash America locations in various states. When the dispute at issue in this action arose, Sparks was working out of the Mobile County location.

Sparks received an annual salary; based on his job performance, he was also eligible to receive incentive bonuses, pursuant to Cash America International's incentive-bonus plan. A dispute arose concerning bonuses that Sparks claimed Cash America International and Cash America of Alabama (hereinafter sometimes collectively referred to as "Cash America") owed him. Sparks sued, alleging that during 1994 and 1995 he had received inadequate incentive-bonus payments while he was a management employee of Cash America. In addition, he alleged that Cash America had converted certain incentive bonuses and certain items of personalty. Finally, Sparks alleged that Cash America had breached a contract by refusing to comply with the provisions of a 1994 incentive-bonus plan.

Sparks claimed he had relied upon certain representations made by employees of Cash America, including his supervisor, Bill Ewing, to the effect that he would receive an incentive-bonus payment pursuant to the terms of the 1994 bonus plan if he agreed to accept a position as a regional manager. Applying the performance factors of the 1994 bonus plan, Sparks calculated his bonus for the first nine months of 1995 to exceed $32,000. The actual bonus Sparks received for that period was $7,500. Sparks claimed an out-of-pocket loss of $25,000 and claimed unspecified damages for mental anguish.

Cash America claimed that the 1994 bonus plan contained both objective factors and discretionary factors and that the $7,500 bonus award had been based in part on the "discretionary" factors. Cash America also claimed that

Sparks was never promoted to the position of regional manager over all of Cash America's Division Five locations, but served only as an assistant to the vice president of that division, with supervisory authority over only half the stores in that division. Thus, Cash America claimed that the payment of the bonus was discretionary and that Sparks was entitled only to a bonus for the stores that he directly supervised within the region.

On March 18, 1998, Cash America moved for a summary judgment as to all of Sparks's claims. The trial court granted the motion with regard to Sparks's count alleging conversion of currency, but denied the motion as to all other claims. A jury trial began on June 2, 1998. Sparks rested his case on June 5, 1998. Cash America moved for a judgment as a matter of law ("JML"), pursuant to Rule 50(a), Ala. R. Civ. P. The court granted the motion as to counts 1, 2, 3, and 10 of Sparks's amended complaint—these counts contained Sparks's claims relating to his 1994 relocation and also the conversion claim that had remained after the court had entered the summary judgment. The breach-of-contract and fraud claims relating to Sparks's 1995 incentive-bonus payment went to the jury. The judge charged the jury on the law of promissory fraud and intentional suppression, specifically as it related to the incentive-bonus plan and the calculation of the bonus payments.

On June 5, 1998, the jury returned a verdict in favor of Sparks and against Cash America, awarding $150,000 in compensatory damages and $1 million in punitive damages. The jury found in favor of Ewing, Sparks's direct supervisor. On the same day, the court entered a judgment on the jury verdict. On June 19, 1998, Cash America moved for a JML or, in the alternative, a remittitur or a new trial.

The trial court heard Cash America's post judgment motion on July 10, 1998. The court, by an order dated August 7, 1998, granted the motion for a remittitur. The order purported

to reduce the award to $75,000 in compensatory damages and $225,000 in punitive damages, for a total damages award of $300,000. However, it. its order the court did not permit Sparks to accept or to reject the remittitur. Rule 59 (f), Ala. R. Civ. P., permits a court to grant a conditional remittitur:

> "(f) *Remittitur.* The court may, on motion for new trial, require a remittitur as a condition to the overruling of the motion for new trial; and, the acceptance of such remittitur by the plaintiff shall not, on appeal by the defendant, prejudice the plaintiff's right to seek reinstatement of the verdict in its full amount .

Thus, the plaintiff may choose either to accept or to reject the remittitur. If the plaintiff accepts the remittitur, then the jury's award is reduced accordingly. If the plaintiff rejects the remittitur, then the defendant is granted a new trial. The trial court neglected to give Sparks the option to accept or to reject the remittitur.

At 11:33 a.m. on August 26, 1998, Cash America filed a motion to alter or amend the court's August 7 order to give Sparks an election. Cash America requested that the August 7, 1998, order be "altered, amended, modified or reissued" to ensure the validity of the order and also requested "such other, further, and different relief as justice may require." At 3:41 p.m. that same day, Sparks filed a notice of appeal from the August 7 order. On August 27, 1998, Sparks filed a motion requesting the trial court to affirmatively "strike defendants' motion to alter or amend" and requesting that Cash America's motion be "held for naught." The court denied Sparks's motion. On August 31, 1998, the trial judge "amended" his August 7 order in which he had ordered a remittitur of the awards. The court amended the order so as to give Sparks until September 14, 1998, to accept the remittitur; otherwise, the amendment provided, Cash America would get a new trial. Sparks pursued his appeal. This Court stayed the August 31, 1998, order to the extent it required

Sparks to elect by September 14 to accept or to reject the remittitur. Cash America cross-appealed.

Sparks asserts that the August 7, 1998, order was legally defective because it did not expressly give Sparks the right to elect whether to accept the remittitur. Moreover, Sparks asserts, because he had appealed from that order before the trial court attempted to amend it, the amendment had no effect. Therefore, Sparks argues, both the order of August 7 and the order of August 31 are void, and the June 5 judgment, in the full amount of the verdict, must stand. We disagree.

The original order ruling on Cash America's post judgment motion is not void. However, the order purporting to amend the judgment to allow Sparks the right to reject the remittitur and choose instead a new trial has no effect, because that original order had already been appealed before the trial court entered the order purporting to amend it. See generally *Ex parte Dowling*, 477 So. 2d 400, 404 (Ala. 1985)

On its cross-appeal, Cash America asks this Court to reverse the original judgment of the trial court and render a judgment in its favor. Cash America contends that it was entitled to a JML on the counts that went to the jury, specifically, Sparks's breach-of-contract and fraud claims. Cash America argues that Sparks's claims relating to the payment of his 1995 incentive bonus should have been dismissed, as a matter of law, because Cash America, it argues, was not contractually obligated to pay Sparks a specific bonus amount. Cash America argues that Sparks presented no evidence to prove any of the elements of promissory fraud or fraudulent suppression and that the award of punitive damages is not supported by clear and convincing evidence. We disagree.

The trial court considered these contentions on several occasions—on pretrial motions for summary judgment; on motions for a JML after the close of the plaintiff's case; and

at the close of all the evidence. The trial court concluded that Sparks had presented substantial evidence on these claims, evidence that created a question for the jury to resolve. The record supports the court's conclusion. The jury had before it evidence from which it could find that Cash America had breached its contract with Sparks and/or had suppressed material facts. See *Talent Tree Personnel Servs., Inc. v. Fleenor*, 703 So. 2d 917 (Ala. 1997).

Thus, the judgment in favor of Sparks and against Cash America, as remitted in accordance with the trial court's order of August 7, 1998—the judgment that is the basis of the cross-appeal—is due to be affirmed. However, because Sparks had filed his notice of appeal from the remittitur order before the trial court attempted to "alter or amend" that order to include language allowing Sparks to elect a new trial, Sparks must be allowed the right to accept or to reject the remittitur. Consequently, the judgment of the trial court is affirmed on the condition that Sparks file with this Court within 28 days of the date of this opinion an acceptance of a remittitur of the compensatory-damages award from $150,000 to $75,000 and a remittitur of the punitive-damages award from $1 million to $225,000; otherwise, the judgment will be reversed and the cause remanded for a new trial. *McCormick v. Alabama Power Co.*, 293 Ala. 481, 306 So. 2d 233 (1975); *B & M Homes, Inc. v. Hogan*, 347 So. 2d 1313 (Ala. 1977).

APPLICATION OVERRULED; OPINION OF OCTOBER 27, 2000, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED CONDITIONALLY.

Hooper, C. J., and Maddox, Houston, Cook, See Lyons Brown, Johnstone, and England, JJ., concur.